D 95-617

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*

Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A School District adopted a policy making condoms available to students in grades seven through twelve. Seventh through twelfth grade students may obtain condoms from the school nurse at no charge. Ninth, tenth, eleventh and twelfth grade students can also purchase condoms for seventy-five cents from vending machines installed in bathrooms in the school. The school condom policy does not require parental consent and does not permit objecting parents to "opt out" of the program. Petitioners (parents and students) filed suit challenging the condom policy. The Supreme Judicial Court of Massachusetts rejected petitioners' constitutional challenge, holding that there was no "burden" on petitioners' rights.

1. Did the Supreme Judicial Court of Massachusetts err by holding, in square conflict with a decision of a New York appellate court, that public school provision of condoms to unemancipated minor students without parental consent and despite parental objections is constitutional?

2. Did the Supreme Judicial Court of Massachusetts err by holding that public school provision of condoms to unemancipated minor students without parental consent and despite parental objections does not burden parental rights?

PARTIES

The following persons were appellants in the proceedings below and are petitioners in this Court:

Elizabeth G. Curtis, by her next friend, Carol Curtis, Carol Curtis, Daniel MacLone, by his next friend, Nancy MacLone, Nancy MacLone, Eugene Bradeen, Alice Bradeen, Bryan Peltzer and Matthew Peltzer, by their next friend, Beverly Peltzer, Beverly Peltzer, and Edward Peltzer.

The following persons were appellees in the proceedings below and are respondents in this Court:

The School Committee of Falmouth, Suzanne McGee, in her official capacity as Superintendent, Howard Campbell, individually and in his official capacity, and Donald Freeman, individually and in his official capacity.

None of the petitioners in this case is a corporation. *See* Rule 29.1.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Supreme Judicial Court of Massachusetts, which is reported as *Curtis v. School Committee of Falmouth*, 420 Mass. 749, 652 N.E.2d 580 (Mass. 1995), is reproduced below as Appendix A at 1a. The trial court's memorandum of decision and order and its judgment, which were not reported, are reproduced in Appendices B and C, at 20a and 35a, respectively.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its

decision in this case on July 17, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

With certain exceptions not pertinent here, Massachusetts compels all its minor children to be in attendance, regularly, at school. M.G.L.A. c. 76 § 1. Parents who fail to cause their children to be in regular attendance at school are subject to fine. M.G.L.A. c. 76 § 2. Children not in regular attendance in school in Massachusetts may be taken in custody on sight by attendance supervisors, without any warrant, and transported to school. M.G.L.A. c. 76 § 20.

Petitioners include the parents of public school students who attend schools that are under the direction and control of the Falmouth School Committee. Petitioners also include certain children of these parents. At the time this lawsuit was filed, each of these children was an unemancipated minor. At least some of these children remain unemancipated minors. The Peltzers, Bradeens, and MacLones reside within the Falmouth School District (hereafter, "FSD"). Carol and Elizabeth Curtis live in Mashpee, Massachusetts, outside the FSD. Students residing in Mashpee attend FSD schools, however, under a contractual agreement between the Mashpee School Committee and the Falmouth School Committee. App. 5a.

During autumn, 1991, the Falmouth School Committee held a series of hearings to consider adopting a policy making condoms available to students in junior and senior high schools. Public opposition to the proposed policy was overwhelming. Nonetheless, in November, 1991, the Falmouth School Committee voted to adopt a policy by which

its employees would distribute condoms to students for free, or make them available for purchase, without parental consent and despite parental objections. App. 5a.

According to the FSD policy, the school nurse at Lawrence Junior High School and Falmouth High School keeps a supply of condoms to give, at no charge, to students who request them. The nurse or other distributor may explain to students requesting condoms the use of the devices and give the students pamphlets about AIDS/HIV. FSD ordered the nurses and other distributors, however, not to express to students their opinions about the condom program. In addition, the FSD installed condom vending machines in the boys' and girls' restrooms at Falmouth High School. At these machines, students could purchase condoms at $.75 each. FSD installed the condom vending machines in the restrooms of the high school during December, 1991, and the condom program was fully in effect on January 2, 1992. App. 22a.

Students attending Lawrence Junior High School range in age from 11 years to 16 years. Without parental knowledge or permission, and indeed despite express parental objections, the school nurse or other school distributor may give these students condoms and instructions on the use of them. The FSD policy does not include any mechanism for enforcing or respecting parental instructions or objections regarding the distribution of condoms to their children. FSD does not provide any "opt-out" procedure for the condom program. App. 5a.

Petitioners filed suit in Massachusetts superior court seeking declaratory and injunctive relief. In their amended

complaint, petitioners challenged the FSD condom policy as violative of both the parental right to direct the upbringing of children and the right to the free exercise of religion.[1] The complaint named as defendants (respondents here) the Falmouth School Committee, the FSD superintendent, and the principals of the junior high and high schools.

The superior court granted summary judgment for respondents. Rejecting the petitioners' federal claims, the superior court held that the condom program "is not coercive of plaintiffs' constitutionally protected rights of privacy and free exercise and, therefore, plaintiffs have failed to make a threshold showing of a constitutional violation of the First and Fourteenth Amendments." App. 31a.

The Supreme Judicial Court of Massachusetts granted direct review and affirmed. App. 1a. Agreeing with the superior court, the state supreme court held that the condom program "is in all respects voluntary and in no way intrudes into the realm of constitutionally protected rights." App. 5a-6a. Perceiving "no threshold demonstration of a coercive burden," the state supreme court affirmed the grant of summary judgment for respondents. App. 6a.

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1. Petitioners also challenged the condom policy on state grounds not pertinent here.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE NEW YORK STATE APPELLATE DIVISION.

Two state courts have finally adjudicated the precise federal constitutional issue presented here. Those courts have reached directly opposite conclusions. This Court should grant review to settle that conflict.

In *Alfonso v. Hernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (1993), *leave to appeal dismissed*, 83 N.Y.2d 906, 637 N.E.2d 279 (N.Y. 1994), a divided five-judge panel of the New York Supreme Court, Appellate Division, struck down a public school condom distribution program indistinguishable from the respondents' condom program. As in the present case, the New York City policy in *Alfonso* directed schools to provide condoms to those students who requested them. "Most importantly, this . . . program d[id] not include a provision for parental consent or opt-out." 195 A.D.2d at 49, 606 N.Y.S.2d at 261.

The *Alfonso* court held that the condom policy violated the parental right to rear children as they see fit.

> Through its public schools the City of New York has made a judgment that minors should have unrestricted access to contraceptives, a decision which is clearly within the purview of the petitioners' constitutionally protected right to rear their children, and then has forced that judgment on them.

Id. at 57-58, 606 N.Y.S.2d at 266. Because parents "must send

their children to school," *id.* at 56, 606 N.Y.S.2d at 266, the *Alfonso* could held that there was "State compulsion on parents to send their children into an environment where they had unrestricted access to free contraceptives," *id.* at 57, 606 N.Y.S.2d at 266.

The state supreme court in the present case reached exactly the opposite result. Noting and rejecting the *Alfonso* majority, App. 11a-12a, the Massachusetts high court held that "'compulsion is totally absent here,'" App. 12a (quoting the dissent in *Alfonso*). Accordingly, the Massachusetts court upheld the respondents' condom policy.

This Court should grant review to resolve this square conflict on an important issue of federal constitutional law.

II. THIS CASE PRESENTS A PRECISE AND IMPORTANT, BUT UNSETTLED, QUESTION OF CONSTITUTIONAL LAW.

The premise of the decision below is simple: a public school that provides children with something their parents vigorously object to does not burden parental rights. In other words, a government school may defy parental wishes with constitutional impunity, so long as the students themselves are agreeable. While this Court has never approved such a flagrantly anti-parent rationale, the governing constitutional law remains unsettled. This Court should therefore grant review to resolve this issue.

The meaning of a constitutional "burden" represents a linchpin of constitutional analysis. In a huge variety of constitutional contexts, the threshold question is whether a challenged government action burdens some right. Whether

the asserted liberty be speech, religious freedom, privacy, association, property, or some other claimed right, the threshold inquiry remains the same: has the government burdened the exercise of the right? If this question yields an affirmative answer, a variety of constitutional tests can obtain: strict scrutiny, rational review, undue burden, and so forth. But if there is no burden, the constitutional analysis halts at the threshold.

In the present case, the state supreme court of Massachusetts has constructed an erroneously high threshold for constitutional claims. According to the court below, parents face no "burden" -- and thus can state no claims whatsoever -- unless their children are forced to participate in an objectionable program.[2] For this reason, the court held that

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2. Although the question is unsettled, the high threshold employed by the lower courts in this case is inconsistent with the lenity afforded by this Court to the scruples of students complaining of their mere exposure to invocations and benedictions at graduation exercises in public schools. *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) ("we have observed before [that] there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools") (citations omitted); *id.* ("[t]he undeniable fact is that the school district's supervision and control of a high school . . . places public pressure, as well as peer pressure, on attending students"); *id.* (public pressure and peer pressure "though subtle and indirect, can be as real as any overt compulsion"). Here, the courts below justified the judgments on the basis that there was no direct coercion of students to take or to use the schools' condoms. In the absence of direct coercion, the lower courts found no injury to the student petitioners' rights or to the parent petitioners' rights to control and direct the upbringing of their children. But this Court has rejected the sort of formalism

petitioners had failed to establish any claim of violation of parental rights or religious freedom.

This reasoning is badly flawed.

Parents have the constitutional right to direct the upbringing of their children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Parental religious liberty includes the direction of their children's religious and moral upbringing. *Employment Division v. Smith*, 494 U.S. 872, 881 & n.1 (1990). Obviously, children will disobey at times, perhaps innumerable times. That is human nature. But when the government knowingly helps children defy their parents, that government burdens parental rights.

The constitutional question presented here is not what circumstances might justify government intervention in extreme cases, such as child abuse and neglect. Justification -- e.g., the evaluation of asserted government interests -- goes to the determination of whether the burden is constitutional or not. But the court below did not even begin to weigh the possible justifications (or lack thereof) in the present case.[3] Instead, the

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necessary to the conclusions reached below. In *Lee*, for example, the parties had stipulated that attendance at graduation is voluntary. *Id.* at 2659. Nevertheless, this Court concluded that such a formalistic assertion lacked "all persuasion[,]" and was "formalistic in the extreme." *Id.*

3. Once the burden on petitioners' rights is acknowledged, the courts below would have to address the sufficiency of the government's asserted interests in providing condoms to students regardless of parental objections. The state supreme court indicated

court below dismissed petitioners' challenge for failure to show a burden in the first place.

The implications of this rationale are enormous. Public schools would be free to provide students with everything from cigarettes, to syringes, to soft porn, to weapons instruction. So long as the school accommodated objecting students, that school could ignore objecting parents. Any students who chose to disobey parental commands would enjoy the school's cooperation in defying parental wishes. The fact that no student would be forced to accept anything would be no consolation -- and no constitutional balm -- for parents all too aware of the potential for childhood rebellion.

When a school helps students defy their parents, that school burdens parental rights. By holding to the contrary, the court below preempted full constitutional analysis and distorted the constitutional concept of a "burden" on rights. This Court should grant review to address and remedy this dangerous precedent.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and set the case for plenary review.

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that factual disputes over this matter may well preclude disposition by summary judgment. *See* App. 6a-7a & note 5.

Respectfully submitted,

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October 16, 1995.

[slip op. 1]

SJC-06684

Elizabeth G. CURTIS & others[1]

vs.

SCHOOL COMMITTEE OF FALMOUTH & others.[2]

Barnstable. March 7, 1995. - July 17, 1995.

Present: Liacos, C.J., Wilkins, Abrams, O'Connor, & Greaney, JJ.

Practice, Civil, Summary judgment. Education, Role of courts. School and School Committee, Condom-availability program. Constitutional Law, Education, Privacy, Parent and child, State action, Freedom of religion. Privacy. Parent and Child, Interference with parental rights. Religion.

Civil action commenced in the Superior Court Department on May 22, 1992.

The case was heard by Gerald F. O'Neill, Jr., J., on a motion for summary judgment.

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1. Carol Curtis, Kristen Jenkinson, Eileen F. McDevitt, Daniel MacLone, Nancy MacLone, Eugene Bradeen, Alice Bradeen, Bryan Peltzer, Beverly Peltzer, and Edward Peltzer.

2. The superintendent of the Falmouth public schools, the principal of Falmouth High School, and the principal of the Lawrence Junior High School. The principals were sued in their official and individual capacities.

The Supreme Judicial Court granted an application for direct appellate review.

Larry L. Crain, of Tennessee (Joseph C. Paruti, with him) for plaintiffs.

Edward T. Hinchey, (Robert G. Eaton with him) for defendants.

Catherine Weiss, of New York, & Sarah Wunsch, for American Civil Liberties Union & others, amici curiae, submitted a brief.

Scott Harshbarger, Atty. Gen., & Amy Spector, Asst. Atty. Gen., for Com., amicus curiae, submitted a brief.

[slip op. 2]

A. Van C. Lanckton, Darren R. Klein & Nancy Weissman, for American Jewish Congress & another, amici curiae, submitted a brief.

LIACOS, C.J. The plaintiffs, students and parents of students in the Falmouth public school system, appealed from a grant of summary judgment in favor of the defendants, the school committee of Falmouth (school committee) and three individual defendants. We granted the school committee's application for direct appellate review. We affirm.

This case involves a program of condom availability established by the defendants in the junior and senior high schools of Falmouth. The plaintiffs brought this action against the defendants in response to the implementation of the program. They requested declaratory and injunctive relief under 42 U.S.C. § 1983 (1988), and G.L. c. 12, § 11I (1994 ed.), in the Superior Court, alleging violations of the their

Federal constitutional rights. A judge in the Superior Court denied relief and granted the defendants' motion for summary judgment.[3]

[slip op. 3]

The plaintiffs alleged in their amended complaint, and now argue before this court, that the condom-availability program, as it stands, violates their right to familial privacy and their guaranteed liberties as parents in the control of the education and upbringing of their children, protected by the Fourteenth Amendment to the United States Constitution. They also argue that the program violates their right to free exercise of religion guaranteed by the First Amendment to the United States Constitution, art. 46, § 1, of the Amendments to the Massachusetts Constitution, and art. 2 of the Declaration of Rights of the Massachusetts Constitution[4]. The plaintiffs ask

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3. In addition to his denial of the plaintiffs' claims, the motion judge granted summary judgment in favor of the defendants on their request for declaratory judgments, to establish that the defendants' conduct violated G.L. c. 274, § 3 (1994 ed.), and G.L. c. 265, § 23 (1994 ed.), by functioning as accomplices to statutory rape of or by the students, G.L. c. 119, § 51A (1994 ed.), by failing to report sexual abuse of students reasonably expected to occur based on students' use of condoms, and G.L. c. 71, § 30 (1994 ed.), the moral education statute. The plaintiffs do not argue these statutory claims on appeal and hence these claims are waived. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). Instead, their argument focuses on their constitutional claims as discussed in the text of this opinion.

4. Since the plaintiffs did not put their State constitutional claims before the judge in the Superior Court, we decline to consider them on appeal. See Albert v. Municipal Court of the City of Boston, 388 Mass. 491, 493-494 (1983), and cases cited. See also Tate,

us to reverse the judge's entry of summary judgment for the defendants and to enjoin the school committee from continuing to make condoms available to students without the inclusion of a provision which would permit parents to opt out of the program and without a system of parental notification of their child's requests for a condom.

The motion judge set forth the facts as follows: "On January 2, 1992, following an authorizing vote of the FSC [Falmouth school committee], the Superintendent of Schools issued a memorandum to the teaching staff of grades 7 through 12, detailing the condom availability program. At Lawrence Junior High School, students could request free condoms from the school

[slip op. 4]

nurse. Prior to receiving them, students would be counseled. The nurse was also instructed to give students pamphlets on AIDS/HIV and other sexually transmitted diseases. At Falmouth High School, students could request free condoms from the school nurse, or students could purchase them for $.75 from the condom vending machines located in the lower level boys' and girls' restrooms. Counseling by trained faculty members would be provided to students who requested it, and informational pamphlets were available in the [school] nurse's office. The Superintendent's memorandum instructed the staff to reserve their own opinions regarding condom availability in order to respect students' privacy. The memorandum also indicates that the Superintendent's presentation of the condom availability to the student body would stress abstinence as the only certain method for avoiding sexually transmitted diseases. The condom availability program took effect on January 2, 1992.

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petitioner, 417 Mass. 226, 230 (1994).

"The FSC condom program does not provide for an 'opt out' for students' parents whereby the parents have the option of excluding their student child from the availability of condoms. Nor is there a parental notification provision in the FSC program by which parents would be notified of their children's requests for condoms.

"Because no high school currently exists in the town of Mashpee, Mashpee residents attend Falmouth High School pursuant to a five-year contract between the Mashpee and Falmouth school committees. The contract does not provide for Mashpee residents

[slip op. 5]

to vote in the elections of FSC members. The contract does not prohibit the Mashpee School Committee (MSC) from entering into a similar contract with other neighboring schools or school committees. On September 20, 1992, the MSC voted 4-1 to object to the FSC condom availability program. Pursuant to the contract between the FSC and the MSC, this vote was not binding on the FSC." (Footnote omitted.)

The judge concluded that the plaintiffs had failed to meet the threshold requirement for each of their claims because they were unable to demonstrate that the condom-availability program placed a coercive burden on their rights. The plaintiffs argue that they were not required to show coercion in order to survive the summary judgment motion. They further argue that, even if coercion is the proper standard, the program meets that standard. Thus, they argue, the State was required to prove the existence of a compelling State interest in maintaining the condom-availability program.

As we shall discuss in more detail below, the condom-availability program in Falmouth is in all respects

voluntary and in no way intrudes into the realm of constitutionally protected rights. Because no threshold demonstration of a coercive burden has been made, nor could have been made on these facts, the defendants properly were granted summary judgment.[5]

[slip op. 6]

In reviewing a grant of summary judgment, we examine whether all material facts have been established and whether the moving party is entitled to judgment as matter of law. We view the evidence in the light most favorable to the nonmoving party. Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974). See Judson v. Essex Agric. & Technical Inst., 418 Mass. 159, 162 (1994); McDonough v. Marr Scaffolding Co., 412 Mass. 636, 638 (1992). "[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Judson v. Essex Agric. & Technical Inst., supra, quoting Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

The plaintiffs dispute the judge's conclusion that there were no material facts at issue. They point to affidavits filed with the court which allegedly contravene the defendants' underlying rationale for implementing the program. These affidavits contain expert opinions on the possible negative repercussions of making condoms available to young people. An argument could be made that these expert opinions might

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5. There is no need for further inquiry into the State's interest since we conclude the judge properly found no constitutional infringement.

be relevant to a determination of the State's interest in implementing the program against the plaintiffs' interest in their constitutionally protected rights. However, the judge found no infringement of the plaintiffs' rights and, thus, did

[slip op. 7]

not reach the stage of constitutional analysis which would have required him to examine the extent of the State's interest. Doe v. Irwin, 615 F.2d 1162, 1169 (6th Cir.), cert. denied, 449 U.S. 829 (1980). These affidavits involve considerations "not germane to the narrow constitutional issue presented." Zorach v. Clauson, 343 U.S. 306, 310 (1952). The issues before the judge were issues of law, i.e., whether the condom-availability program, the provisions of which are not in dispute, infringes on the rights of the plaintiffs to familial privacy, parental liberty, and free exercise of religion. We conclude that the judge properly decided the case on a motion for summary judgment. Attorney Gen. v. Bailey, 386 Mass. 367, 374, cert. denied sub nom. Bailey v. Bellotti, 459 U.S. 970 (1982). We turn now to a review of the judge's determination of the issues. See McNulty v. McDowell, 415 Mass. 369, 370 (1993), and cases cited.

We begin our discussion by defining the role of the courts with respect to the administration of public education. Public education of children is unquestionably entrusted to the control, management, and discretion of State and local school committees. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir.), cert. denied, 474 U.S. 826 (1985). See G.L. c. 72, § 37, wherein the Legislature explicitly delegates this authority to local school committees.

"Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems

[slip op. 8]

and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, supra. Furthermore, courts must take caution before they order changes in educational programs adopted by duly chosen local authorities[6]. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir.1987), cert. denied, 484 U.S. 1066 (1988). Obviously, "a State's interest in universal education ... is not totally free from a balancing process when it impinges on fundamental rights and interests...." Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Yet, in the absence of a direct and sharp implication of basic constitutional values, this dispute is not an issue for the courts. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988); Wisconsin v. Yoder, supra at 234-235.

1. Parental liberty and familial privacy claim. The plaintiffs argue that the condom-availability program violates their substantive due process rights, protected by the Fourteenth Amendment, to direct and control the education and the upbringing of their children. In the same vein, they argue that the program invades the constitutionally protected "zone of privacy" which surrounds the family. Further, they claim the program intrudes on these rights because it allows their minor children unrestricted access to contraceptives without parental input and

[slip op. 9]

within the compulsory setting of the public schools. They

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6. Here, the program was implemented after numerous town meetings and school committee meetings, culminating in a final vote of the school committee in favor of the program. The plaintiffs do not take issue with the validity of the political process by which the condom-availability program was approved.

claim that in these circumstances parents have the right to intervene and prohibit their children from obtaining the condoms (by an opt-out provision in the program), and that they have a right to parental notification if their child requests and obtains a condom.

We agree that parents possess a fundamental liberty interest, protected by the Fourteenth Amendment, to be free from unnecessary governmental intrusion in the rearing of their children. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, supra at 232-233; Prince v. Massachusetts, 321 U.S. 158, 166-167 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923). We recognize that, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, supra at 535. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and the upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, supra at 232. See Ginsberg v. New York, 390 U.S. 629, 639 (1968). Aspects of child rearing protected from unnecessary intrusion by the government include the inculcation of moral standards, religious beliefs, and elements

[slip op. 10]

of good citizenship. Wisconsin v. Yoder, supra at 233. See Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra. Thus, for example, in Meyer v. Nebraska, the Court held that the State could not prohibit the teaching of languages other than English in the public school. Similarly, in Pierce v. Society of Sisters, supra, the Court held that the State could not

pass a law requiring that all students attend public school, rather than private or parochial schools[7]. The Court has held, on substantially the same reasoning, that government may not intrude unnecessarily on familial privacy. Prince v. Massachusetts, supra. See Moore v. Cleveland, 431 U.S. 494, 499 (1977).[8]

While it is clear that the plaintiff parents possess these protected interests, they have failed to demonstrate how the interests are burdened by the condom-availability program to an extent which would constitute an unconstitutional interference by the State. This is the threshold requirement in the analysis of these constitutional claims. Without it, we need not inquire

[slip op. 11]

into the State's interest in implementing the program. Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir.1980).

The type of interference necessary to support a claim based on an alleged violation of parental liberty appears to be that

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7. Each of these laws might have been upheld, however, had the State been able to show a compelling interest requiring State action. For example, in Prince v. Massachusetts, 321 U.S. 158 (1944), the Court held that the State's interest in protecting children by laws prohibiting child labor overcame a parent's interest in directing the religious development of her child. Id. at 166-167.

8. Massachusetts caselaw has endorsed these principles. See, e.g., Matter of McCauley, 409 Mass. 134, 136-137 (1991); Care & Protection of Charles, 399 Mass. 324, 333-334 (1987); Custody of Two Minors, 396 Mass. 610, 617 (1986); Commonwealth v. Stowell, 389 Mass. 171, 173 (1983); Richards v. Forrest, 278 Mass. 547, 553 (1932).

which causes a coercive or compulsory effect on the claimants' rights. The plaintiffs claim, however, that they were only required to show an infringement of their rights, and not necessarily a coercive one. While courts apparently have not explicitly stated that "coercion" is the standard, they have not proceeded further in the constitutional analysis unless the governmental action has had a coercive effect on the claimants' parental liberties. See Doe v. Irwin, supra at 1168. See also Wisconsin v. Yoder, supra (compulsory school attendance law violated, inter alia, Amish parents' right to direct religious upbringing of children); Pierce v. Society of Sisters, supra (law requiring public school attendance and prohibiting attendance at private parochial schools violated parental liberties); Meyer v. Nebraska, supra (law prohibiting teaching of foreign languages to school children violated parental liberties). These cases strongly imply that, in order to constitute a constitutional violation, the State action at issue must be coercive or compulsory in nature. Coercion exists where the governmental action is mandatory and provides no outlet for the parents, such as where refusal to participate in a program results in a sanction or in expulsion. See, e.g., Wisconsin v. Yoder, supra;

[slip op. 12]

Meyer v. Nebraska, supra at 399-401; Pierce v. Society of Sisters, supra; Doe v. Irwin, supra.

We discern no coercive burden on the plaintiffs' parental liberties in this case. No classroom participation is required of students. Condoms are available to students who request them and, in the high school, may be obtained from vending machines. The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. In other words, the students are free to decline to participate in the program. No penalty or disciplinary action ensues if a student does not

participate in the program. For their part, the plaintiff parents are free to instruct their children not to participate. The program does not supplant the parents' role as advisor in the moral and religious development of their children. See Doe v. Irwin, supra at 1168. Although exposure to condom vending machines and to the program itself may offend the moral and religious sensibilities of the plaintiffs, mere exposure to programs offered at school does not amount to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program. See Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal.App.3d 1, 30-31 (1975), appeal dismissed, 425 U.S. 908 (1976); Medeiros v. Kiyosaki, 52 Haw. 436, 438-439 (1970).[9]

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9. The plaintiffs argue that Planned Parenthood of Southeastern Pa. v. Casey, 112 S.Ct. 2791 (1992), as well as Ohio v. Akron Center for Reproductive Health, 497 U.S. 502

[slip op. 13]

(1990), and Hodgson v. Minnesota, 497 U.S. 417 (1990), demonstrate a protected interest in preserving the parent-child bond in decisions regarding whether to bear children. In those cases the Court upheld a State requirement that minors obtain parental consent before having an abortion. The plaintiffs argue that, if parental notification is required for abortion, then that same requirement should naturally apply to support a right of parental input before the act of sexual intercourse occurs.

The two situations are hardly comparable: abortion involves a medical procedure, while obtaining a condom does not. While these cases reaffirm the Court's respect for the parent-child bond and encouragement of parent-child communication, these cases place the privacy interests of minors in a position superior to parental liberties. In each of the cases, the Court upheld the parental consent requirement only because the law in issue also provided an

[slip op. 13]

The plaintiffs argue that the condom-availability program is coercive because, although participation is voluntary, the program has been implemented in the compulsory setting of the public schools. See G.L. c. 76, § 1 (1994 ed.). In this connection, they rely on an opinion of a divided lower court (three-to-two decision), Alfonso v. Fernandez, 195 A.D.2d 46 (N.Y.1993), which struck down a similar program in New York public schools as a violation of the parents' right to direct the upbringing of their children. The New York court based its decision, in part, on the fact that State law required the parents to send their children to school in combination with the fact that the program did not include an opt-out provision for parents whereby they could prohibit their children from obtaining condoms. While the case may be read as supporting the plaintiffs' position, we disagree with its reasoning. Moreover, we point out that the decision was based more directly on a State

[slip op. 14]

law which required parental consent for medical treatment. The court concluded, erroneously we think, that the distribution of condoms constituted a medical service for which parental consent was required. See Alfonso v. Fernandez, supra at 61-65 (Eiber, J., dissenting).

With regard to the discussion in the case on compulsory attendance, we agree with the view expressed by the dissent that "the mere fact that parents are required to send their children to school does not vest the condom ... program with the aura of 'compulsion' necessary to make out a viable claim

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alternative to parental consent. Minors may receive abortions under these laws without parental consent if consent is granted by a court.

of deprivation of a fundamental constitutional right. Unlike Meyer v. Nebraska, ... where a state attempted to totally prohibit parents from permitting their children to study a foreign language until after completion of the eighth grade, or Pierce, ... where a state attempted to prohibit parents from sending their children to private parochial schools, the element of compulsion is totally absent here." Id. at 67. We agree further that "the fact that students are in closer proximity to a potential source of contraceptive devices does not change the fundamentally voluntary nature of the program.... [N]othing compels the petitioners' children to participate in the program." Id. at 68. Because we conclude the program lacks any degree of coercion or compulsion in violation of the plaintiffs' parental liberties, or their familial privacy, we conclude also that neither an opt-out provision nor parental notification is required by the Federal Constitution. With the exception of the Alfonso case, it

[slip op. 15]

appears that cases requiring an opt-out or "excusal system" have involved school programs which would otherwise be compulsory. See, e.g., Citizens for Parental Rights v. San Mateo County Bd. of Educ., supra at 32; Medeiros v. Kiyosaki, supra at 440-441. Such is not the case here.

2. First Amendment free exercise claim. Next, the plaintiffs argue that the condom-availability program violates their Federal constitutional rights to the free exercise of religion. Religious freedom is guaranteed by the free exercise clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[10]

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10. The First Amendment applies to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296

The preliminary inquiry in a free exercise analysis is whether the challenged governmental action creates a burden on the exercise of a plaintiff's religion. United States v. Lee, 455 U.S. 252, 256-257 (1982). See United States v. Means, 858 F.2d 404, 406 (8th Cir.1988), cert. denied, 492 U.S. 910

[slip op. 16]

(1989). Only if a burden is established must the analysis move to the next step: a consideration of the nature of the burden, the significance of the governmental interest at stake, and the degree to which that interest would be impaired by an accommodation of the religious practice. United States v. Means, supra. The degree of interference with free exercise necessary to trigger further analysis of the State's justification for the action in question, must at least rise to the level of a "substantial burden." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989). The Supreme Court has indicated that, just as in the context of a parental liberties claim, a "substantial burden" is one that is coercive or compulsory in nature. See Lyng v. Northwest Indian Cemetery Protective

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(1940). In Attorney Gen. v. Desilets, 418 Mass. 316, 320-321 (1994), we determined that claims based on art. 46, § 1, are to be analyzed under the Supreme Court's First Amendment jurisprudence as it existed prior to the recent decision in Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990), which altered the Supreme Court's First Amendment analysis only as to the degree of State interest required to overcome laws which substantially, but indirectly, burden religious conduct. See Salvation Army v. Department of Community Affairs of N.J., 919 F.2d 183, 194 (3d Cir.1990). In the view we take of the instant case, the holding of Smith is not relevant to our decision, nor does the Religious Freedom Restoration Act of 1993 (42 U.S.C. §§ 2000bb et seq.) seeking to reinstate the earlier Federal standard of Wisconsin v. Yoder, 406 U.S. 205 (1972), add anything to the plaintiffs' case.

Ass'n, 485 U.S. 439, 447-451 (1988); School Dist. of Abington v. Schempp, 374 U.S. 203, 222-223 (1963). See also Bowen v. Roy, 476 U.S. 693, 704-705 (1986); Smith v. Board of Educ., N. Babylon Union Free Sch. Dist., 844 F.2d 90, 92-93 (2d Cir.1988); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir.1987); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir.1985). The free exercise clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such," either directly or indirectly. McDaniel v. Paty, 435 U.S. 618, 626 (1978). Wilson v. Block, 708 F.2d 735 (D.C.Cir.), cert. denied, 464 U.S. 956 (1983), and cert. denied sub nom. Hopi Indian Tribe v. Block, 464

[slip op. 17]

U.S. 1056 (1984)[11]. In our view the plaintiffs are unable to demonstrate sufficient facts to support their argument that the condom policy substantially burdens their rights to freely exercise their religion to any degree approaching constitutional dimensions.

The plaintiffs argue that the condom-availability program burdens their right freely to exercise their religion by creating a conflict between the religious teaching of parents as to the issue of premarital sexual intercourse, and the view, allegedly endorsed by the school committee, that sexual activity before

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11. Massachusetts cases addressing the issue of religious freedom under both the State and the Federal Constitutions have generally also inquired, as a preliminary matter, whether the State action creates a substantial burden on a claimant's free exercise of religion. Attorney Gen. v. Desilets, supra at 322. Fedele v. School Comm. of Westwood, 412 Mass. 110, 116 (1992), quoting Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989).

marriage is not only permissible but also can be made safe. The plaintiffs contend further, as noted in the previous section, that the program is coercive in nature, because it exists in the public schools, to which parents are compelled to send their children, and because it lacks an opt-out provision by which parents could choose to prohibit their children from obtaining condoms at school. The plaintiffs also argue that peer pressure may add to the coercive effect of the program.

Although all citizens have a right freely to exercise their religion, the free exercise clause "cannot be understood to require the Government to conduct its own internal affairs in

[slip op. 18]

ways that comport with the religious beliefs of particular citizens.... The Free Exercise Clause affords an individual protection from certain forms of compulsion...." Lyng v. Northwest Indian Cemetery Protective Ass'n, supra at 448, quoting Bowen v. Roy, 476 U.S. 693, 699-700 (1986). See School Dist. of Abington v. Schempp, supra at 221-222. "[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification for its otherwise lawful actions." Lyng v. Northwest Indian Cemetery Protective Ass'n, supra at 450-451. The "Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Id. at 451, quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). See Yonkers Racing Corp. v. Yonkers, 858 F.2d 855, 871 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989).

Courts have found violations of the free exercise clause

where the State conditions receipt of an important benefit on conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief. Smith v. Board of Educ., N. Babylon Union Free Sch. Dist., supra at 93. The Supreme Court has invalidated conditions on the receipt of unemployment benefits which indirectly burden free exercise without sufficient justification. See Hobbie v.

[slip op. 19]

Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

We conclude that the program in issue which does not violate the plaintiffs' parental liberties or privacy rights also does not violate their rights freely to exercise their religion. There is no requirement that any student participate in the program. The plaintiffs argument that the well-known existence of peer pressure in secondary schools adds to the alleged burden on their free exercise rights simply does not rise to the level of constitutional infringement. See Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal.App.3d 1, 17 (1975); Smith v. Ricci, 89 N.J. 514, 521, appeal dismissed sub nom. Smith v. Brandt, 459 U.S. 962 (1982). The condom-availability program in Falmouth does not penalize students or parents for their religious beliefs or condition the receipt of benefits on a certain belief. Although the program may offend the religious sensibilities of the plaintiffs, mere exposure at public schools to offensive programs does not amount to a violation of free exercise. Parents have no right to tailor public school programs to meet their individual religious or moral preferences. Epperson v. Arkansas, 393 U.S. 97, 106 (1968). Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir.1985).

Judgment affirmed.

[slip op. 1]

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 92-518

ELIZABETH G. CURTIS, and others[1]
VS.
THE FALMOUTH SCHOOL COMMITTEE, and others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, junior high school students in the Falmouth School System and their parents, brought this action against defendants, the Falmouth School Committee (FSC), in response to FSC's implementation of a condom availability program in the schools. Plaintiffs' amended complaint alleges that the condom distribution infringes on family privacy and free exercise rights in violation of the First and Fourteenth Amendments of the United States Constitutions, 42 U.S.C. § 1983 and G.L. c.12 §11I. Plaintiffs also seek declaratory

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1. By next friend, Carol Curtis and Carol Curtis, Daniel MacLone, by next friend, Nacy MacLone and Nancy Malone, Eugene Bradeen, Alice Bradeen, Bryan Peltzer and Matthew Peltzer, by their next friend Beverly Peltzer, and Beverly Peltzer, and Edward Peltzer

2. Suzanne McGee, in her official capacity as superintendent, Howard Campbell, individually and in his official capacity, Donald Friedman, in his official capacity

judgments establishing that defendants' conduct violated G.L. c.274, §3 and G.L. c. 265, §23, by functioning as accomplices to statutory rape on or by the students, G.L. c.119, §51A, by failing to report sexual abuse of

[slip op. 2]

students reasonably expected to occur based on students' use of condoms, and G.L. c.71 § 30, the moral education statute. Finally, plaintiffs also seek a preliminary injunction to prevent defendants from continuing to make condoms available to students.

This matter is now before the court on defendants' motion for summary judgment. FSC argues that because the plaintiffs have failed to make a threshold showing of a constitutional violation, summary judgment should enter in their favor. Defendants further argue that plaintiffs have neither standing nor a cause of action for the declaratory relief sought, and that plaintiffs have not met their burden for injunctive relief. For the reasons stated below, defendants' motion for summary judgment is allowed, and plaintiffs' motion for preliminary injunction is denied

BACKGROUND

The undisputed material facts are taken from the pleadings and affidavits submitted by the parties.

On January 2, 1992, following an authorizing vote of the FSC, the Superintendent of Schools issued a memorandum to the teaching staff of grades 7 through 12, detailing the condom availability program. At Lawrence Junior High School, students could request free condoms from the school nurse. Prior to receiving them, students would be counseled[3]. The

nurse was also

[slip op. 3]

instructed to give students pamphlets on AIDS/HIV and other sexually transmitted diseases. At Falmouth High School, students could request free condoms from the school nurse, or students could purchase them for $.75 from the condom vending machines located in the lower level boys' and girls' restrooms. Counseling by trained faculty members would be provided to students who requested it, and informational pamphlets were available in the nurse's office. The Superintendent's memorandum instructed the staff to reserve their own opinions regarding condom availability in order to respect students' privacy. The memorandum also indicates that the Superintendent's presentation of the condom availability to the student body would stress abstinence as the only certain method for avoiding sexually transmitted diseases. The condom availability program took effect on January 2, 1992.

The FSC condom program does not provide for an "opt out" for students' parents whereby the parents have the option of excluding their student child from the availability of condoms. Nor is there a parental notification provision in the FSC program by which parents would be notified of their children's request for condoms.

Because no high school currently exists in the town of Mashpee, Mashpee residents attend Falmouth High School pursuant to a five-year contract between the Mashpee and

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3. Plaintiffs' complaint alleges that on one occasion, a Lawrence Junior High student who requested a condom on a Friday afternoon and was supplied with one after being asked only, "do you know how to put one on?" and then told to return for counseling the following week.

Falmouth School committees. The contract does not provide for Mashpee residents to vote in the elections of FSC members. The contract does not prohibit the Mashpee School Committee (MSC) from entering into a similar contract with other neighboring schools or school

[slip op. 4]

committees. On September 20, 1992, the MSC voted 4-1 to object to the FSC condom availability program. Pursuant to the contract between the FSC and the MSC, this vote was not binding on the FSC.

DISCUSSION

I. Summary judgment and preliminary injunction

Because a request for injunctive relief requires an evaluation of the moving party's likelihood of success on the merits as well as the nature of the injury claimed, Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-17 (1980), the court will first consider the defendants' motion for summary judgment on the merits.

Summary judgment shall be granted where there are no genuine issues as to any material fact in dispute and where the moving party is entitled to judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and [further,] that the moving party is entitled to judgment as a matter of law." Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative

evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 850, 809 (1991); accord, Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716

[slip op. 5]

(1991).

The material facts in the present matter are undisputed[4]. Plaintiffs allege that the FSC program is unconstitutional. Their position is that the FSC condom distribution program conveys a message of encouragement to the students to engage in sexual promiscuity. Specifically, plaintiffs argue that the program interferes with their constitutionally protected right to nurture and direct the moral upbringing of their children. At the same time, plaintiffs argue that the FSC program violates their right to freely exercise their religion by instilling in their children sincerely held beliefs regarding chastity, morality and the sin of sex outside of marriage.[5] To be sure, plaintiffs share defendants' concern over the spread of AIDS/HIV amongst the students. Nevertheless, plaintiffs' position is that the state of Massachusetts, acting through the FSC, must not be allowed to invade the constitutionally protected privacy of the home, nor interfere with the constitutional guarantee of freedom of

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4. Plaintiffs have submitted numerous affidavits, articles and studies which dispute the effectiveness of latex condoms in prevention of the spread of AIDS/HIV. Whether such data is controverted or not, it is not material for the purpose of deciding summary judgment, nor germane to the constitutional issue presented. See Zorach v. Clausen, 343 U.S. 306, 310, 72 S.Ct. 679, 682 (1952).

5. The sincerity of plaintiffs' beliefs is not an issue.

exercise.

Defendants deny that the FSC condom availability program invades these constitutionally protected areas. Moreover, defendants argue that because plaintiffs have not established that the FSC condom policy violates plaintiffs' constitutional

[slip op. 6]

rights, that this case should be dismissed as a matter of law. Defendants ask the court to refrain from substituting its judgment for that of the FSC, whose condom policy was arrived at through proper political and legislative processes.[6]

A. Predicate finding of constitutional violation

This case involves the competing interests of parents and the state in the education and upbringing of children. The law is well settled that public education of children is committed to the control, management and discretion of state and local school committees. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166-167, 64 S. Ct. 438, 442 (1944); Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968); Wulff v. Wakefield, 221 Mass. 427, 429 (1915). The law is also established that the constitution protects "zones of privacy", Roe v. Wade, 410 U.S. 113, 152, 93 S. Ct. 705, 726 (1973), Carey v. Population Services International, 431 U.S. 594, 684, 97 S. Ct. 2010, 2016 (1977), including family relationships, Prince, 321 U.S. at 166, and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573 (1925); Meyer v. Nebraska, 262 U.S. 390, 399,

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6. Plaintiffs have not attacked the legitimacy or adequacy of this political process.

43 S.Ct. 625 (1923).[7]

"A State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interest, such as those

[slip op. 7]

specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . ." Wisconsin v. Yoder, 406 U.S. 212, 214, 92 S. Ct. 1526, 1532 (1972). However, judicial balancing of the state's interests against the parents' interests occurs only if a constitutional violation of the state has first been established. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 109 S. Ct. 2136, 2149 (1989) (free exercise inquiry asks first whether government has substantially burdened central religious belief, if so, whether compelling government interest justifies it); Lyng v. Northwest Indian Cemetary Protective Assoc., 485 U.S. 439, 447-452, 108 S. Ct. 1319, 1324-1326 (1988) (road construction through Native American sacred grounds not violative of the First Amendment; balancing of burden on free exercise against state's compelling interest predicated on finding of constitutional violation); Yoder, 406 U.S. at 214, 92 S. Ct. at 1532 (state compulsory school attendance law found to impinge on Amish free exercise); Doe v. Irwin, 615 F. 2d 1162, 1169 (6th Cir. 1980) (where no unconstitutional interference with parents rights was found, there was no need to engage in balancing of state's and parents' interests). See also, Ware v. Valley Stream High School District, 550 N.E.2d 420, 426 (Ct.

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7. Among these privacy interests is a minor's right to make decisions affecting procreation, including a right to access contraception. Carey v. Populations Services International, 431 U.S. 678, 693-694, 97 S. Ct. 2010, 2020-2021 (1977).

App. of NY 1989) (free exercise inquiry follows two step analysis). "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 103, 104, 89 S. Ct. 266, 270 (1968). Thus, in order for plaintiffs in this

[slip op. 8]

matter to survive summary judgment, this court must find that the FSC condom policy rises to the level of a constitutional infringement.

B. Coercion required for constitutional violation

Because issues of free exercise and privacy are so intertwined in this case, and because "the outer limits of this aspect of privacy have not been marked" Carey, 431 U.S. at 684, 97 S. Ct. at 2016, the court will address both rights using the First Amendment free exercise inquiry[8]. See Grove v. Mead School, 753 F.2d 1528, 1531 (9th Cir.), cert. den., 474 U.S. 826, 106 S. Ct. 826 (1985) (one aspect of religious freedom of parents is the right to control the religious upbringing and training of their minor children).

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or

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8. Alternatively, even if the free exercise and privacy inquires were conducted separately, they would both focus on coercion as the test for a constitutional violation. See Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir. 1980) (noting that the leading U.S. Supreme Court cases analyzing violations of parents' constitutional right to care and nurture their children focus on whether the state is either requiringor prohibiting some activity).

prohibiting the free exercise thereof . . ." U.S. Const., amend. I. "The distinction between the two clauses is apparent -- a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause need not be so attended." School District of Abington v. Schemp, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572 (1963) (emphasis added). "To establish a violation of that [free exercise] clause, a litigant must show that the challenged state action has a coercive effect that operates against the litigant's

[slip op. 9]

practice of his or her religion." Id, 374 U.S. at 222, 83 S. Ct. at 1572. The government cannot prohibit the free exercise of religion, either directly or through indirect coercion or penalties on free exercise. Lyng 485 U.S. at 449, 108 S. Ct. at 1326.

"This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice but have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." Id. Mere exposure to ideas which contradict religious beliefs does not impermissibly burden the free exercise of religion; the First Amendment does not guarantee that a school curriculum will offend no religious beliefs. See Ware v. Valley Stream High School, 550 N.E.2d 420, 427 (Ct. App. NY 1989). See also Grove v. Mead School District, 753 F.2d 1528, 1543 (9th Cir.), cert. den., 474 U.S. 826 (1985) (mere offense at having textbook in school curriculum, where reading not compelled, did not violate First Amendment); Wilson v. Block, 708 F.2d 735, 741 (D.C. Cir. 1983) (government actions that merely offend or cast doubt on religious beliefs do not violate Free Exercise Clause). Moreover, "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions or any religious sect

or dogma." Epperson, 393 U.S. at 106, 89 S. Ct. at 271.

[slip op. 10]

C. FSC program not coercive

Plaintiffs in the present matter argue that the FSC program is coercive in two ways[9]. On one hand, plaintiffs assert that the program is coercive because under the compulsory attendance law of Massachusetts, G.L. c. 76, §1, plaintiffs are required to send their children to school, thus the students' acceptance of the FSC condom program is compelled, in contradiction of plaintiffs family values and religious beliefs. Plaintiffs rely heavily on Wisconsin v. Yoder, 406 U.S. 212, 92 S. Ct. 1526 (1972), in which the United States Supreme Court held that the compulsory education statute of that state violated the Amish plaintiffs' rights under the Free Exercise Clause of the First Amendment.

The situation in the Yoder case is clearly distinguishable from the present matter. To begin with, the compulsory education statute of Wisconsin was truly coercive, in the sense that parents who failed to comply with it faced criminal charges and convictions. The Court, after making exhaustive findings regarding the religious beliefs and practices unique to the Amish community held that, "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." Yoder, 406 U.S. at 218, 92 S. Ct. at 1534. The Yoder Court went on to limit the reach of its finding, stating that the

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9. Plaintiffs also argue that coercion is not necessary to a claim of a violation of free exercise or privacy.

[slip op. 11]

factual record establishing the coercive effect of the Wisconsin statute on the Amish was "one that probably few other religious groups or sects could make. . . " Yoder, 406 U.S. at 235-236, 92 S. Ct. at 1543. See also Lyng, 485 U.S. at 457, 108 S. Ct. 1329; Doe, 615 F.2d at 1168 (both cases distinguishing Yoder based on the coercive nature of its compulsory education statute). Thus, reliance on the Yoder case is misplaced, because plaintiffs have not shown that the FSC condom policy inescapably compels them to perform acts undeniably at odds with their religious and moral beliefs.

Plaintiffs also contend that the FSC condom program is coercive or compulsory, because it fails to provide parents with an "opt out" mechanism allowing them to withhold their children's participation in the program. The fact that there is no "opt out" provision, in and of itself, cannot be said to give the FSC condom program a coercive character. If the FSC condom availability program is not coercive, there is no need for an "opt out" provision.

The FSC condom program is one of "condom availability" and not one of "condom distribution." As described by the undisputed facts above, the FSC program is not coercive. FSC is not in any way forcing students to participate in the program, and neither students nor their parents are being penalized or sanctioned if they choose not to participate. See Alfonso v. Fernandez, 584 N.Y.S.2d 406, 410 (1992) (public high school's condom availability program, which did not include an "opt out" provision for parents, held not violative of constitutional parental privacy or free exercise rights). "A State benefit is

[slip op. 12]

not being conditioned upon conduct prohibited by one's faith, nor is a benefit denied due to conduct mandated by one's faith."

Id. Simply put, the condoms are there for the asking.

Moreover, there is "no prohibition against plaintiffs' participating in decisions of their minor children on issues of sexual activity and birth control. The plaintiffs remain free to exercise their traditional care, custody and control over their unemancipated children." Doe, 615 F.2d 1162, 1169 (6th Cir. 1980) (no deprivation of parental privacy right found where program making contraceptives available to minors did not provide for parental notification).[10] Competition for students' attention and allegiance, incidental burdens on religious beliefs, and exposure to ideas inconsistent with personal and moral values do not per se rise to the level of constitutional infringements.

In conclusion, this court finds that the FSC condom availability program is not coercive of plaintiffs' constitutionally protected rights of privacy and free exercise and, therefore, plaintiffs have failed to make a threshold showing of a constitutional violation of the First and Fourteenth Amendments. The same analysis disposes of the plaintiffs' claim under 42 U.S.C. §1983 and G.L. c.12, §11I.

[slip op. 13]

The court must therefore refrain from determining whether a compelling state interest outweighs the parents constitutional interests. "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government,

---

10. In fact, because minors have constitutional rights toaccess contraceptives, an "opt out" provision may itself be constitutionally problematic. See Carey, 431 U.S. at 692, 97 S. Ct. at 2020 ("the State does not have the constitutional authority to give a third party an absolute and possibly arbitrary veto [citation omitted] which the state itself is absolutely and totally prohibited from exercising").

many of them rooted in sincere religious beliefs, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions." Lyng, 485 U.S. at 453, 108 S. Ct. at 1327. As a matter of law, summary judgment must be granted. Furthermore, because plaintiffs have not demonstrated a likelihood of success on the merits, their request for a preliminary injunction is denied.

II. Declaratory relief under statutory claims

A declaratory judgment under G.L. c.231A requires an actual controversy which is specifically set forth in the pleadings. A court action cannot concern hypothetical controversies. The purpose of the "actual controversy" requirement is to ensure that litigants file complaints for declaratory judgment to obtain relief only from "uncertainty and insecurity with respect to rights, duties, status and other legal relations." Mass. Assoc. of Ind. Agents and Brokers Inc. v. Commr. of Ins., 373 Mass. 290, 292 (1977). A real dispute is raised by a litigant with a definite interest, which unless addressed will almost immediately and inevitably lead to litigation. Bunker Hill Distributing Inc. v. District Attorney for the Suffolk District, 376 Mass. 142, 144 (1978). Abstract assertions will not support a claim for declaratory judgment. Quincy City Hospital v. Rate Setting Commission, 406 Mass. 431, 439 (1990).

Plaintiffs have not demonstrated that an actual dispute

[slip op. 14]

exists under G.L. c.274, §3 and G.L. c.265, §23, accessory to statutory rape. More importantly, plaintiffs have no cause of action or standing to seek a declaration as to how the Commonwealth should proceed in enforcing the state's criminal statutes. "[I]n American jurisprudence . . . a private citizen

lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Whitley v. Commonwealth, 369 Mass. 961, 962 (1975) (citing Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Nor may a court properly direct or compel the executive to prosecute a law, in light of the principle of separation of powers of Part I, Art. 30 of the Massachusetts Constitution. Burlington v. District Attorney for the Northern District, 381 Mass. 717, 721 (1980).

For virtually the same reasons, declaratory judgment is not proper under G.L. c.119, §51a. Plaintiffs' claim under this reporting statute is dependent on a declaration that the FSC was and continues to be an accessory to statutory rape. For the reasons stated above, plaintiffs have no standing for declaratory judgment. Moreover, a decree that defendants must report their own criminal activity against their own penal interests would seriously implicate defendants' constitutional rights against self-incrimination.

Finally, plaintiffs also lack standing under the moral education statute, G.L. c.71, §30, which vests a cause of action in employers of educators, allowing them to restrict certain communications while at work, communications otherwise protected by the free speech guarantee of the First Amendment. See Coyne v. City of Somerville, 770 F. Supp. 740, 751-753 (D. Mass. 1991).

[slip op. 15]

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1) Defendants' motion for summary judgment is ALLOWED;
2) Plaintiffs' motion for preliminary injunction is DENIED;
3) Plaintiffs' claim for declaratory relief is DISMISSED

/s/ Gerald F. O'Neill, Jr.
Gerald F. O'Neill, Jr.
Justice of the Superior Court

Dated: October 7, 1993
[attestation omitted]

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. **SUPERIOR COURT**

No. 92-518

ELIZABETH G. CURTIS et al.

VS.

THE FALMOUTH SCHOOL COMMITTEE et al

JUDGMENT (SUMMARY)

(Pursuant to Mass. R. Civ. P. 56)

This action came on to be heard before the Court, O'Neill, J., presiding, upon motion of the defendants, Falmouth School Committee, Suzanne McGee, Superintendent, Donald Friedman, Individually and as Principal, and Howard Campbell, Individually and as Principal, for summary judgment pursuant to Mass. R. Civ. P. 56, the parties having been heard and the Court having considered the pleadings and affidavits, finds there is no genuine issue as to material fact and that the defendants, are entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

that the complaint of plaintiffs, Elizabeth G. Curtis ppa, Carol Curtis, Kristen Jenkinson ppa, Eileen F. McDevitt, Daniel MacLone ppa, Nancy MacLone, Eugene Bardeen, Alice Bardeen, Bryan Peltzer ppa, Beverly Peltzer and Edward Peltzer, be and hereby is dismissed against defendants, Falmouth School Committee, Suzanne McGee, Superintendent, Donald Friedman, Individually and as Principal, and Howard Campbell, Individually and as Principal, without costs.

Dated at Barnstable, Massachusetts, this eighth day of October, 1993.

FORM OF JUDGMENT APPROVED:

/s/ Gerald F. O'Neill, Jr.
Justice of the Superior Court

/s/ Phyllis A. Day
Clerk

Supreme Court, U.S.
FILED
NOV 16 1995
OFFICE OF THE CLERK

(2)

No. 95-617

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*,

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

---

RESPONDENTS' BRIEF IN OPPOSITION

---

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18 pp

QUESTION PRESENTED

Whether a voluntary condom availability program adopted by the School Committee of the Town of Falmouth violates any protected rights of family privacy or parental liberty under the Due Process Clause of the Fourteenth Amendment.

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No. 95-617

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*,

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

For the purposes of certiorari consideration, the facts of the case are adequately presented in the opinion of the Supreme Judicial Court of Massachusetts. App. 4a-6a. However, Petitioners' statement of facts does not make clear that under Massachusetts state law, students may attend public, private or home schools. Mass. Gen. L. ch. 76, § 1 (1982).

In addition, Petitioners have mistakenly given the impression that, "Public opposition to the proposed [condom availability] policy was overwhelming." Pet. at 3. On May 19, 1992, the condom availability program was submitted to a vote at the annual town election. An undisputed majority voted in favor of the program.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS AND "ANOTHER STATE COURT OF LAST RESORT."

Rule 10(b) of the Supreme Court Rules provides that this Court may grant a petition for writ of certiorari when

> a state court of last resort has decided an important federal question that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Petitioners argue that their petition for writ of certiorari should be granted because a conflict exists between the decision of the Supreme Judicial Court of Massachusetts holding the condom availability program constitutional, and the decision of an intermediate appellate court in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), *leave to appeal dismissed*, 637 N.E.2d 279 (N.Y. 1994). In fact, there is no genuine conflict because *Alfonso* was decided as a matter of state law, and the views of the panel on the constitutional principle at issue here were *dicta*. The "conflict," if

any, is between the holding of the Massachusetts high court and the *dicta* of a New York intermediate court. Such "conflict," if any, neither merits plenary consideration nor requires final resolution by this Court because it is not a conflict between two state courts of last resort.

The *Alfonso* decision was rendered by a divided panel of the New York Supreme Court, Appellate Division. The New York Court of Appeals, New York's court of last resort, dismissed the motion for leave to appeal. Dismissal of a motion for leave to appeal is not the equivalent of an affirmance, and the order denying the motion for leave to appeal has no precedential value.[1] *See Two Associates v. Brown*, 516 N.E.2d 1219 (N.Y. 1987); *State Communities Aid Assoc. v. Regan*, 506 N.E.2d 535 (N.Y. 1987); *In re Marchant v. Mead-Morrison Mfg.*, 169 N.E. 386 (N.Y. 1926). The court of last resort of the State of New York, the Court of Appeals, simply has not spoken on the constitutional issues discussed in the *Alfonso* case (and also raised by the present case); therefore, there is no relevant conflict between a court of last resort in Massachusetts and a court of last resort in New York. Indeed, if the New York Court of Appeals ever chose to address these issues, its decision could be consistent with that of the Massachusetts Supreme Judicial Court.

This Court has dismissed writs of certiorari as improvidently granted when it became apparent that an alleged conflict did not actually exist. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923)

[1] The Court of Appeals may hear appeals from the Appellate Division if "the construction of the constitution of the state or of the United States is directly involved therein." N.Y. Const. art. 6, § 3b(7). Therefore, the Appellate Division was not the court of last resort for the constitutional issues presented by *Alfonso*.

(writ dismissed as improvidently granted when Court concluded that decisions of Fifth and Ninth Circuit Courts of Appeal were not in conflict). This Court noted that a writ of certiorari is warranted in the case of a conflict "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Id.* at 393. The same rationale properly applies to this Court's certiorari discretion with respect to decisions of state courts. This Court should only grant a writ of certiorari "where there is a real and embarrassing conflict of opinion and authority" between the state courts of last resort. Because no such conflict exists in the present case, the petition for writ of certiorari should be denied.

II. THE *ALFONSO* COURT STATED AN INDEPENDENT AND ADEQUATE STATE LAW BASIS FOR ITS DECISION.

As noted above, the intermediate appellate court in *Alfonso* based its decision primarily upon New York state law. Therefore, its adjudication of the constitutional claims was unnecessary,[2] its views are *dicta* and any claim that the courts of two states conflicted on a *federal* question is further foreclosed. Because this Court will not review judgments of state courts that rest on adequate and independent state grounds,[3] the existence of a conflict between two state courts should not be predicated upon a case decided upon those grounds.

---

[2] The *Alfonso* decision did not invalidate the New York condom program; rather, the court ordered that a parental consent provision be added to conform to the requirements of pre-existing state law. While its constitutional analysis reached the same conclusion, it was gratuitous.

[3] *See Herb v. Pitcairn*, 324 U.S. 117 (1945); *Michigan v. Long*, 463 U.S. 1032 (1983).

The dispositive issue decided in *Alfonso* was whether New York Public Health Law § 2504 established an applicable exception to the common-law requirement of parental consent for providing a health service to a minor child. The court stated that the distribution of condoms

> is clearly a health service for the prevention of disease which requires parental consent. . . . [W]hile the purpose of the condom availability component of the program may be commendable, the Legislature has not acted to abrogate the common-law rule and to authorize the New York State Commissioner of Education or the respondents to direct or permit the delivery of such a health service to minor, unemancipated high school students in public school buildings without some parental role through opt-out or consent.

606 N.Y.S.2d 259, 263-264.

The Supreme Judicial Court of Massachusetts faced no state law issues and specifically recognized the state law basis for the *Alfonso* decision:

> [W]e point out that the [*Alfonso*] decision was based more directly on a State law which required parental consent for medical treatment. The [*Alfonso*] court concluded, erroneously we think, that the distribution of condoms constituted a medical service for which parental consent was required. *See Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (Eiber, J., dissenting).

Curtis v. School Committee of Falmouth, 652 N.E.2d 580, 586 (Mass. 1995); App. 13a (internal citation omitted).

The adequate state law basis for the court's opinion in *Alfonso* therefore eliminates the presence of a significant federal question. In the absence of a conflict regarding a substantial federal question between two state courts "of last resort," the petition should be denied.

III. THE ISSUES PRESENTED DO NOT WARRANT PLENARY REVIEW.

In affirming the state trial court's grant of summary judgment in favor of the Respondent School Committee of Falmouth, the Supreme Judicial Court of Massachusetts found that "the condom-availability program in Falmouth is in all respects voluntary and in no way intrudes into the realm of constitutionally protected rights."[4] *Curtis* at 583; App. 5a-6a. The program neither requires nor forbids any conduct. No child is forced to receive counseling or to obtain condoms, and certainly no sanction -- against parent or student -- is imposed for failure to participate in the condom availability program. The program does not compel students to disregard parental instructions or teachings;[5] it does not command or forbid conduct that is at odds with any family's values; it does not require or forbid anything at all.

[4] The factual basis for this finding is not challenged by Petitioners at this stage of the proceedings.

[5] The petition is laced with references to the school helping children to defy their parents (*see* Pet. at 7, 9, 10); there is no evidence that the school has assumed any role in "helping" students to defy parental wishes. Contrary to the assertions of Petitioners, the decision to obtain condoms and/or counseling is a matter within each student's discretion and subject to his or her parents' guidance because, as the Supreme Judicial Court correctly found, the program "is in all respects voluntary." *Curtis* at 583; App. 5a-6a.

A. The Voluntary Condom Availability Program Adopted By The Respondent School Committee Of Falmouth Does Not Interfere With Parental Rights Or Liberties.

Respondents recognize parents' liberty interest in directing the upbringing and education of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). However, "neither rights of religion nor rights of parenthood are beyond limitation. . . . [A state's] authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The state does not have the power to foreclose the freedom of individuals or groups to choose an alternative method of education. *See Meyer* and *Pierce, supra.* Only *burdensome* state restrictions upon parental choices have been declared unconstitutional. In *Meyer*, this Court struck down a state's attempt to prohibit teaching any subject in a language other than English -- subject to criminal penalties. In *Pierce*, this Court found that a statute requiring parents to send their children to public school "unreasonably interferes with the ability of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Similarly, in *Yoder*, this Court found that a state statute requiring school attendance until age 16 (and containing criminal sanctions) impaired the free exercise of the Amish religion. *Id.* at 236.

Each of these cases challenged a mandatory requirement or prohibition involving some compulsory requirement and imposing a criminal sanction for noncompliance. In

sharp contrast, the Falmouth condom availability program is entirely voluntary, prescribes no conduct and imposes no penalty. Parents can still instruct their children in a manner consistent with their own moral and religious convictions. There being no genuine limitation upon parental choice, this case presents no important issue that merits review by this Court.

Petitioners attempt to equate potential exposure to the school program to a loss of parental liberty. This effort fails for two reasons. First, public school attendance is, ultimately, a matter of parental choice, a choice guaranteed by successive rulings of this Court. Government retains the right to set the curriculum in its own schools and those who object may choose to exercise their right to select private or other alternate educational programs. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *See also Care and Protection of Charles*, 504 N.E.2d 592, 597 (1987). Having selected public schools, parents cannot thereafter contend that optional school activities deprive them of their rights.

Petitioners' reliance upon *Lee v. Weisman*, 505 U.S. 577 (1992), is misplaced. That case does not teach that "mere exposure" to an objectionable school policy in a voluntary setting represents an impermissible burden upon fundamental rights. Rather, *Lee* holds that prayer offered by clergy as part of an official public school graduation ceremony is forbidden by the Establishment Clause of the First Amendment. The constitutional limitations upon public prayer at a school function stated in *Lee* are far removed from the issue of raised by a condom availability program. *Lee*, therefore, does not address whether an entirely voluntary program violates parental rights, or whether parents should have control over any element of such a program.

Even if a First Amendment analysis was applied to the facts of this case, the same conclusion of no constitutional violation would be reached. This Court has rejected a claim that a voluntary public school program which permitted students to attend religious activities during school hours put the "weight and influence of the school . . . behind a program for religious instruction." *Zorach v. Clauson*, 343 U.S. 306, 309 (1952).

B. This Court Has Demonstrated A Preference for Avoiding Local School Disputes Unless Basic Constitutional Values Are "Sharply Implicated."

The dispute presented in this case is of the type best suited for local resolution. This Court "has long recognized that local school boards have broad discretion in the management of school affairs." *Board of Education v. Pico*, 457 U.S. 853, 863 (1982). Further,

> [c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

Because Petitioners have failed to demonstrate a coercive burden upon their rights as a result of the challenged condom availability school program, their complaint should be viewed as a local matter best handled outside the judiciary.

At the heart of Petitioners' challenge to the condom availability program is a moral objection to the policy choice

made by the School Committee of Falmouth. The sincerity of Petitioners' objection is unquestioned, but this is precisely the type of objection best raised before other branches of government. As Justice O'Connor observed:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. . . . The Constitution does not, and the courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent it is feasible, is for the legislatures and other institutions.

Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 452 (1988).

C. The Court Below Used The Proper Standard For Evaluating Petitioners' Claims.

Petitioners assert that the court below used "an erroneously high threshold" for evaluating their constitutional claim. Pet. at 8. The Supreme Judicial Court of Massachusetts properly required a showing of a substantial or a coercive burden upon a liberty interest before undertaking a constitutional analysis. Finding no such burden presented by the facts of this case, the court below did not reach the questions of state interests or justification of the challenged program.[6]

---

[6] It is not difficult to predict that the condom availability plan could, in a proper case, pass even strict scrutiny review. As long ago as 1977, this Court took judicial notice of the "devastating" problems associated with the fact that "the incidence of sexual activity among minors is high."

The threshold for establishing an unconstitutional violation of a right protected by the Due Process Clause should certainly be no less exacting than a claimed violation of the First Amendment, where a coercive burden must be shown. In that context, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963). More recently, this Court has stated, "As our jurisprudence relating to all liberties . . . has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v. Casey*, 505 U.S. 833, ___, 112 S. Ct. 2791, 2818 (1992).

In sum, Petitioners have offered no authority for the proposition that the *claim* of a "burden" on parental rights, standing alone, entitles them to full constitutional analysis.

Carey v. Population Services Int'l., 431 U.S. 678, 695-696 n.21 (1977). These problems have only escalated in the years since *Carey*, as HIV and AIDS cases have reached crisis levels.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 16, 1995

MOTION FILED

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No. 95-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*,

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

MOTION OF THE FAMILY RESEARCH COUNCIL, OF THE PEOPLE FOUNDATION, AND FRIENDS OF ELIZABETH CURTIS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICI CURIAE*

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MOTION OF THE FAMILY RESEARCH COUNCIL, OF THE PEOPLE FOUNDATION, AND FRIENDS OF ELIZABETH CURTIS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICI CURIAE*

The Family Research Council, Of The People Foundation, and Friends of Elizabeth Curtis (collectively, the "Proposed *Amici*") hereby move, pursuant to Rule 37.2, for leave to file a brief *amici curiae* in support of the Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts (the "Petition"). The Petition seeks review of a Massachusetts state court decision upholding Respondents' program of dispensing condoms to unemancipated minors attending public schools, without requiring parental consent or permitting parents with objections to the condom program to opt out their minor children. The Petitioners have consented in writing to the filing of the brief *amici curiae*. The Respondents, whose written consent was also requested, have refused consent. In accordance with Rule 37.2, a copy of the brief *amici curiae* is attached to this motion.

Interest Of The Proposed *Amici*

As set forth more fully in the "Statement Of Interest" section of the attached brief, the Proposed *Amici* are three nonprofit, public interest organizations with a demonstrated interest in preserving the fundamental rights of parents to rear and educate their children in accord with their own reasonable values and religious beliefs. They include the Family Research Council (the "Council"), a national organization that serves as an advocate for traditional family values in the private and public sector, and Of The People Foundation (the "Foundation"), a national organization that conducts research on the status of parental rights and serves as a national information clearinghouse on parental rights. The Proposed *Amici* also include Friends of Elizabeth Curtis (the "Friends group"), a New York-based parents group comprised of William and Ignacia Alfonso, and William and

Joanne Gough, the prevailing petitioners in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993). The *Alfonso* case is directly at odds with the Massachusetts Supreme Judicial Court decision, and the constitutional issues it determined are at the heart of the litigation between Petitioners and Respondents.

The Proposed *Amici* seek to bring their collective knowledge, experience and expertise in the area of parental rights to this action, and believe that the attached brief *amici curiae* will assist the Court in apprehending the threat to constitutionally-protected parental rights posed by the Massachusetts decision.

Desirability Of A Brief *Amici Curiae*

This case concerns questions of fundamental parental rights that extend far beyond the Falmouth County school district. At issue is whether the State, without a showing of a compelling interest, can use its compulsory school attendance laws to compel parents to send their minor children into an environment that the parents believe reasonably threatens their children's health and welfare. Here, that environment is a public school where children are being offered, without parental consent and over parental objections, contraceptive devices for the purpose of engaging in "safe sex."

The Proposed *Amici* submit that, absent a compelling state interest, Respondents' condom distribution program violates the petitioning parents' constitutionally-protected right to rear their children as they reasonably see fit. The attached brief explains this constitutional issue, which was misapprehended and summarily disregarded by the Massachusetts court. Accordingly, the Proposed *Amici* respectfully request leave of this Court to file the attached brief *amici curiae* in support of the Petition.

Respectfully submitted,

/s/ Sundria R. Lake

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Dated: November 15, 1995

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*,

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF *AMICI CURIAE* OF THE FAMILY RESEARCH COUNCIL, OF THE PEOPLE FOUNDATION, AND FRIENDS OF ELIZABETH CURTIS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The Family Research Council, Of The People Foundation, and Friends of Elizabeth Curtis (collectively, the "*Amici Curiae*") respectfully submit this brief *amici curiae* in support of the Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts (the "Petition").

STATEMENT OF INTEREST

The *Amici Curiae* are public interest organizations with knowledge, experience and expertise in the area of constitutionally-protected parental rights. They are committed to preserving and safeguarding the rights of parents to rear and educate their children in accord with their own reasonable

values and religious beliefs, without unreasonable and unnecessary infringement by governmental authorities and other policy-makers.

The Family Research Council (the "Council") is a national advocacy organization that is an expert on family and parental rights issues. Since 1981, the Council has played an active role in gathering and publishing data about the family, and promoting legislation and policies designed to strengthen the position of the family.

Of The People Foundation (the "Foundation") is also a national organization that is an expert on parental rights. Since 1993, the Foundation has served as a national information clearinghouse on parental rights, collecting and disseminating information on parental rights issues and the areas, such as public education, in which parental rights are being infringed.

Friends of Elizabeth Curtis (the "Friends group") is a parents group that has become expert on the subject of parental rights through personal experience. The Friends group is comprised of William and Ignacia Alfonso, and William and Joanne Gough, the parents who successfully challenged the New York City Board of Education's distribution of condoms to unemancipated minors without parental consent or a parental opt-out in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993). Because the constitutional issues determined in *Alfonso* are at the center of this litigation and are, thus, at stake, the Friends group's interests are directly implicated by the decision of the Massachusetts Supreme Judicial Court.

ARGUMENT

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The constitutional importance of this case lies in a fact that was clearly misapprehended by the court below. The record amply demonstrates that the school-based condom program complained of by the petitioning parents is one which they reasonably believe is dangerous to their children's health and welfare. Nationwide, the evidence indicates that schools that make condoms available to students, more often than not, experience an increase in student sexual activity, pregnancies and sexually transmitted diseases.[1] Thus, the real issue in this case is whether the State, without a compelling interest, can use its mandatory school attendance laws to force parents to send their unemancipated minor children to a school that invites students to take part in such a program, without permitting parents to veto their children's participation based on reasonable concerns about the threat to their children's health and well-being. The issue is *not* about exposure of children to ideas and viewpoints that their parents find offensive or disagreeable.

This case poses an important federal question of substantive due process under the Fourteenth Amendment that has not been, but should be, settled by this Court. The state courts that have considered the issue have reached conflicting conclusions. At one end of the spectrum is the decision of the Massachusetts Supreme Judicial Court, which ruled that the

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[1] For example, a San Francisco high school that provided students with coupons redeemable for condoms achieved a significant increase in student condom usage, but experienced a 25 percent increase in female student sexual activity and pregnancy rates. Douglas Kirby, et al., *Six School-Based Clinics: Their Reproductive Health Services and Impact on Sexual Behavior*, Family Planning Perspectives, January/February 1991, pp. 11-12, 15.

respondent school district's condom availability program did not violate the petitioning parents' substantive due process rights under the Fourteenth Amendment, even though it denied them any opportunity to opt their children out of the program that was never shown to be supported by a compelling state interest. The Massachusetts court found that, even though the program was implemented in the compulsory setting of the public schools, it lacked the degree of coercion or compulsion required to show a burden on the petitioning parents' constitutional rights.

At the other end of the spectrum is *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), where a New York appellate court ruled that a similar condom distribution program impermissibly infringed the petitioning parents' due process rights. There the court found that the parents were being forced, without a compelling necessity therefor, to surrender their right to influence and guide the sexual activity of their minor children under the Fourteenth Amendment. The New York court found the fact that the condom program was implemented in the compulsory setting of the public schools to be determinative.

The decisions of the Massachusetts and New York courts as to the same constitutional issue are irreconcilable. Both courts reached their conclusion in purported reliance on the precedents of this Court, which have long recognized that parents possess a constitutionally-protected interest in rearing and educating their children in accord with their own views and religious beliefs. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 214, 232-33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). However, because these precedents do not address the precise questions that are presented by the Petition and that were present in *Alfonso*, the state of the law as to this important federal constitutional question of parental rights remains unsettled and in conflict.

Without this Court's resolution of the due process question, the interpretation of constitutionally-protected parental rights is likely to vary from state to state. In Pennsylvania, for example, parents are litigating with the Philadelphia school district over its implementation of a condom distribution program in public schools. That litigation is ongoing, although an appellate court recently recognized that the parents have a substantial and protectable interest in ensuring that their express parental consent is obtained prior to the commencement of a school condom distribution program. *See Parents United for Better Schools, Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 646 A.2d 689 (Pa. Commw. Ct. 1994). Related issues of parental rights in public education have also arisen in Georgia, where the parents of two teenage girls have sued school officials because a school counselor took the 14- and 15-year-old girls, without their parents' knowledge or consent, to a clinic that dispensed prescription oral contraceptives and condoms, and administered AIDS tests and pap smears. *Waymon F. Earls, et al. v. Stephens County Sch. Dist., et al.*, No. 2:95-CV-97-WCO (N.D. Ga. 1995). State and federal courts alike, thus, need clarification from this Court as to the scope of constitutionally-protected parental rights in this particularly sensitive area.

Amici Curiae submit that because parents have a fundamental right to rear their children in accord with their own views about health and sexual abstinence, they should also be held to have a corresponding right to opt their children out of a state-sponsored "safe sex" program that exposes their children to potential health risks -- when that program takes place in the compulsory setting of the public schools and the program is unsupported by a compelling state interest. Moreover, Respondents cannot avoid accountability to the parents by labeling students' participation in the program as "voluntary"; the issue here is not students' choice, but rather compulsion on parents to surrender their right to affirmatively guide and direct their children's choices and to prevent them from falling in harm's way. Public education should not require the sacrifice of such fundamental parental rights.

The bottom line is that school authorities do not have unfettered discretion to interfere in the parent-child relationship. Parents have rights, too, and when school authorities implement programs that threaten the health and welfare of minor children -- whether by making contraceptive devices available upon demand for "safe sex" or dispensing clean needles for "safer" intravenous drug use -- parents, at a constitutional minimum, must be permitted to just say no. The Massachusetts court failed to acknowledge this basic fundamental right, and has thereby created a dangerous precedent for usurping parental authority as to virtually any subject.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition, the *Amici Curiae* respectfully urge this Court to grant the Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

REPLY ARGUMENT

The Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts should be granted that this Court may consider and settle an important, but unsettled question of federal law. In their Brief in Opposition Respondents have failed to undercut the substantial basis for review on certiorari in this case.

First, the Respondents erroneously assert that *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), *leave to appeal dismissed*, 637 N.E.2d 279 (N.Y. 1994), is not a decision of a state court of last resort as required by Rule 10(b) of this Court's rules. Where review in the highest state court lies within the discretion of that court, and an

application for such review is denied, the decision of an inferior state court is treated as a decision by a state court of last resort. *See* Argument I, *infra.*

Second, Respondents erroneously assert that the Petition does not demonstrate a real decisional conflict, because the decision of the substantial federal question in *Alfonso* was mere dicta. The *Alfonso* Court reached and decided the substantial federal question; the separate decision on a state law matter does not convert the decision on the federal question into mere dictum. *See* Argument II, *infra.*

Third, the decision of the court below directly conflicts with the decision of a state court of last resort of another State. To justify the burdening of the substantial federal rights in this case, Respondents assert that the condom policy is voluntary, not coercive, because parents can satisfy the compulsory attendance obligation imposed under state law by sending their children to private or parochial schools. Respondents' notion of voluntariness conflicts with the settled principle that one may not be forced to select between enjoying a constitutional right and participating in a generally available public program.

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF "A STATE COURT OF LAST RESORT."

Respondents propose that no conflict cognizable under Rule 10(b) of this Court's Rules has been shown in the Petition. *See* Opp. at 2-4. Respondents doubt that *Alfonso v.*

Hernandez, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), *leave to appeal dismissed*, 637 N.E.2d 279 (N.Y. 1994), constitutes the decision of a state court of last resort. Respondents are wrong in their premise.

This Court has said that, where review in New York Court of Appeals is discretionary and an application for leave to appeal was refused by the Court of Appeals, the decision of the Appellate Division *is* a decision by a state court of last resort. *See Mellon v. O'Neill*, 275 U.S. 212, 213 (1927) ("[l]eave to appeal to the Court of Appeals was denied . . . and the judgment of the Appellate Division thereby became the final decision of the highest court of the State in which a decision could be had").

In *Alfonso*, leave to appeal was sought from and denied by the New York Court of Appeals. *See Alfonso v. Hernandez*, 637 N.E.2d 279 (N.Y. 1994) (motion for leave to appeal dismissed). Thus, *Alfonso* meets the requirements of Rule 10(b). *Alfonso* is a decision of a state court of last resort. And, as shown in the Petition, the judgment below and the decision in *Alfonso* stand in sharp conflict.

II. *ALFONSO* DECIDED AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Respondents surmise that the resolution of the substantial federal question in *Alfonso* constituted mere dicta, *see* Opp. at 2-5, because the *Alfonso* court also decided the case on an independent state law ground, *see* Opp. at 4-5. Respondents err in that premise as well. In *United States v.*

Title Insurance & Trust Co., 265 U.S. 472 (1924), this Court answered a contention much like the one made by Respondents here. There this Court said:

> [I]t is urged that what we have described as [a] rul[ing] there was obiter dictum, and should be disregarded, because the court there gave a second ground for its decision, which was broad enough to sustain it independently of the first ground. The premise of the contention is right, but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'

265 U.S. at 486 (citations omitted). *See also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum") (citing cases).

Respondents' error is plain. Because the decision in *Alfonso* can be supported by that court's determination of a statutory right under New York law, Respondents would reduce that court's *holding* regarding a federal constitutional right to dicta. The result in *Alfonso*, however, is adequately supported on either ground. Consequently, under the rule in *Title Insurance and Trust Co.*, 265 U.S. at 486, Respondents' contention -- that the resolution of the substantial federal question in *Alfonso* was mere dicta -- is wrong.

III. THE ISSUES PRESENTED WARRANT PLENARY REVIEW.

In Falmouth, Massachusetts, a school may -- nay, must -- give a condom to any junior high or high school student who requests one, even if that student's parents have not consented and have specifically directed the school not to give their child a condom. The premise of the decision in the court below -- that this policy does not even impose a threshold burden on the rights of parents to direct the upbringing of their children -- conflicts not only with *Alfonso v. Hernandez* but also with common sense. Pet. § III.

Respondents maintain that the condom policy is voluntary as to parents because parents can choose to take their children out of public school. Opp. at 8. This argument suffers from at least two flaws. First, as a practical matter, public school is the only option for parents who lack the means to select a private school alternative. Second, forcing parents to forego a public benefit (publicly funded education) to exercise their fundamental parental prerogative itself constitutes a clear burden on parental liberty. *Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program"); *id.* at 717 ("Governmental imposition of such a choice puts the same kind of burden upon the [right] as would a fine imposed [for its exercise]") (internal quotation marks and citation omitted).

Respondents cite *Zorach v. Clauson*, 343 U.S. 306 (1952), for the proposition that a voluntary public school program is constitutional. Opp. at 9. But the program in

Zorach respected parental wishes: the challenged program took place at a distinct location off school grounds, and "[a] student is released on written request of his parents." 343 U.S. at 308. The Falmouth condom program, by contrast, takes place on school premises, requires no parental consent, and, in fact, disregards contrary parental instructions.

"In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Hence, the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

The Falmouth School Committee has left parents out of the childrearing equation in the crucial area of childhood sexual development. "It is clear that such an intrusion by a State into family decisions . . . would give rise to grave questions . . . comparable to those . . . presented in *Pierce* . . . ." *Yoder*, 406 U.S. at 231-32. This Court should grant review to address those "grave questions."

CONCLUSION

For the foregoing reasons, this Court should grant this petition and set the case for plenary review.

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